SUPREME COURT
OF THE
UNITED STATES
October Term 1977

No. 77-269

SIMMIE LYNN McCALL and
BILLY DON MILLS,

Petitioners,

vs.

THE STATE OF TEXAS,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

To the Honorable WARREN E. BURGER, Chief Justice of the United States of America, and to the Honorable Associate Justices of the United States Supreme Court:

Comes now SIMMIE LYNN McCALL and BILLY DON MILLS, Petitioners, by their attorneys, Roger S. Hanson, Esq., of Santa Ana, California, a member of the Bar of the United States Supreme Court, and Ray Gene Smith, Esq., of Wichita Falls, Texas, and Scott Hudson, Esq., of Dallas, Texas, petitioning this Honorable Court for a Writ of Certiorari directed to the Court of Criminal Appeals of the State of Texas at Austin, Texas, to review constitutional errors occurring in their trial of burglary conducted in the District Court of the State of Texas in Wichita Falls, Texas.

Pursuant to Rule 23, Rules of the Supreme Court of the United States, petitioners submit the following:

(a)

OPINION BELOW

The Texas Court of Criminal Appeals rendered opinion on May 18, 1977, a copy of which is attached to this petition as Exhibit "A". A Petition for Rehearing was made and was denied on or about June 8, 1977. A copy of the Postal Card denying same is herewith attached as Exhibit "B".

(b)

The grounds upon which the jurisdiction of this Honorable Court is invoked are:

(i) the date that the judgment which is sought to be reviewed was entered is May 18, 1977;

(ii) a petition for rehearing was made and denied on June 8, 1977, by the Texas Court of Criminal Appeals.

(iii) the statutory provision conferring jurisdiction on this Honorable Court is 28 U.S.C. 1257(3) which provides:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . .By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

(1) Jurisdiction of this Honorable Court is further invoked because, although presented to them, the Texas Court of Criminal Appeals has refused to rule on the constitutionality of a Texas State Judge instructing the jury during the penalty phase of petitioners' trial that:

". . .It will be proper for you in determining the penalty to be assessed to fix the same by lot, chance, or any other method than by a full, fair, and free exercise of the opinion of the individual jurors, under the evidence admitted before you. . ." (Page 3, lines 1-5, of the **Argument to the Jury**].

(2) Jurisdiction of this Honorable Court is further invoked because the Texas Court of criminal Appeals, although the issue was placed before them, has refused to rule on the denial of due process caused to petitioner Billy Don Mills by the State Prosecutor wilfully suppressing exculpatory statements exonerating him of the crime of burglary of a car radio made by an observer of that crime, one **FUGETT,** within the meaning of **Mooney v. Holohan,** 294 U.S. 103; **Pyle v. Kansas,** 317 U.S. 213; **Mesarosh v. United States,** 352 U.S. 1; **Alcorta v. Texas,** 355 U.S. 28; **Napue v. Illinois,** 360 U.S. 264, 269; **Brady v. Maryland,** 373 U.S. 83, 87; **Miller v. Pate,** 386 U.S. 1; **Giglio v. United States,** 405 U.S. 105; **DeMarco v. United States,** 415 U.S. 449; and **United States v. Agurs,** 427 U.S. 97. See also **In Re Ferguson,** 5 Cal 3d 525; **People v. Ruthford,** 14 Cal 3d 399, 405-409. **People v. Westmoreland,** 58 Cal App 3d 32.

(3) Jurisdiction of the Honorable Court is further invoked because the Texas Court of Criminal Appeals uses a non-constitutional standard to evaluate the effectiveness of criminal defense counsel at trial where the instant record is clear that defense counsel failed to provide adequate defense including, but not limited to,

(a) failure to undertake pre-trial discovery to dredge to the surface exculpatory evidence exonerating petitioner Billy Don Mills in the crime of theft of a car radio, and as a result, advised the said Mills to plead guilty:

(b) failure to object to clear error of the state prosecutor commenting on petitioner's failure to testify within the meaning of Griffin v. California, 380 U.S. 609, and failure to request a jury instruction that the failure of the petitioners to take the stand shall not be construed against them.

(c) failure to develop a defense of intoxication to mitigate a penalty of 10 years imprisonment for simple burglary.

(c)

QUESTIONS PRESENTED FOR REVIEW

1. Whether a criminal sanction can be constitutionally imposed in Texas within the meaning of **In Re Winship,** 397 U.S. 358, 364, when the criminal jury is instructed that:

". . . It will be proper for you in determining the penalty to be assessed, to fix the same by lot, chance, or any other method than by a full, fair and free exercise of the opinion of the individual jurors, under the evidence admitted by you. . ." (Page 3, lines 1-5, **Arguments to the Jury**].

2. Whether reversal is required because the prosecutor failed to turn over and did suppress a statement totally **exculpating** appellant Billy Don Mills of burglary of a motor vehicle made to the prosecutor by one Larry Fugett, within the meaning of **Brady v. Maryland,** 373 U.S. 83, 87; **United States v. Agurs,** 427 U.S. 97, and

Giglio v. United States, 405 U.S. 150; see also such persuasive authority as **In Re Ferguson,** 5 Cal 3d 525, 529-533; **People v. Ruthford,** 14 Cal 3d 399, 405-409; **Napue v. Illinois,** 360 U.S. 264, 269.

3. Whether reversal is required because the trial attorney failed to protect certain well-recognized constitutional rights of the defendants such as prosecutoral misbehavior condemned under **Griffin v. California,** 380 U.S. 6709, 14 L. Ed 2d 106, 85 S. Ct. 1229, and such as the seeking of discovery, and such as the calling of key defense witnesses to establish diminished capacity to form the specific intent to commit the crimes of burglary of a building and of a motor vehicle?

4. Whether jury misbehavior occurred in this case by the jorors:

(a) discussing that the defendants-appellants did not testify in their own behalf.

(b) talking to persons in the halls contrary to the Court's instructions set forth at line 11-20, page 3, of **Arguments To The Jury.**

(c) determining or potentially determining the penalty by lot, or chance, or "any other method," as they were instructed by the Court at Page 3, lines 1-5 of **Argument To the Jury.**

5. Whether the Honorable Texas Court of Criminal Appeals properly conceived the issue of effective assistance of counsel as "wilful misconduct", "bad faith, insincerity, or disloyalty toward appellants by their attorney", citing State of Texas cases on effective assistance of counsel, e.g. **Ex Parte Prior,** 540 S.W. 2d 723; **Duran v. State,** 305 S.W. 2d 863: **Williams v.State,** 513 S.W. 2d 54; **Coble v. State,** 501 S.W. 2d 344; **Faz v.**

State, 510 S.W. 2d 922; **Ex Parte Raley**, 528 S.W. 2d 257; **Chapman v. State**, 478 S.W. 2d 91, etc. (pages 1-2, **May 18, 1977, Opinion**], when in fact the **real errors** complained of go to well-defined Federal Constitutional errors such as

a) failure to seek clearly discoverable and useful exculpatory statements (**Brady v. Maryland**, 373 U.S. 83, 87; **United States v. Agurs**, 427 U.S. 97, 49 L. Ed. 2d 342, 96 S. Ct. 2392, 19 Cr. L. 3195 (6-24)76), and **Giglio v. United States**, 405 U.S. 150),

(b) failure to object to error promulgated under **Griffin v. California**, 380 U.S. 609, 14 L. Ed. 2d 106, 85 S. Ct. 1229,

(c) failure to object to use of the **hearsay** indictment as an instrument of the November 13, 1975, burglary by use of the proximate date of the second burglary, i.e., December 18, 1975.

(d) failure to request a jury instruction that appellants' failure to take the stand and testify could be used for any purpose in fixing penalty,

(e) failure to request a jury instruction that the Grand Jury Indictment could not be used for any purpose in fixing penalty,

(f) failure to properly investigate the facts of the case such as interview of **Larry Fugett**, who gave an exculpating statement of **Billy Don Mills**, and to interview other witnesses who could testify to the intoxication level of the defendants to support a diminished capacity defense in mitigation of punishment,

(g) failure to disqualify himself as to **joint** representation of **Mills** and **McCall** in spite of a clear and manifest conflict of interest such as **Mills** being a non-participant in the motor vehicle burglary while **McCall** was seen to overtly commit it.

6. Whether the jury should have been instructed on any plausible defense theory of the case such as mitigation of punishment because of intoxication, under Texas Penal Code 8.04 A. B. C, D, E, where evidence was introduced by the defense on this issue, and whether if any credible evidence is introduced on the issue, an instruction is mandatorily required, and whether the objection and exception to failure to instruct was properly made and should have been granted? (See "Exceptions and Objections to the Charge of the Court"].

(d)

UNITED STATES

CONSTITUTIONAL AMENDMENTS INVOLVED

Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Fourteenth Amendment:

"All persons born or naturalized in the United States, and subject to the jurisdiciton thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(e)

STATEMENT OF FACTS IN SUPPORT OF GRANT OF CERTIORARI

Petitioners McCall and Mills were convicted of separate counts of burglary on their plea of guilty in the District Court of Wichita Falls, Texas.

Under Texas law, a jury may be impaneled to assess the penalty. Petitioners chose this method of determining the sanction to be imposed.

The state District Judge then instructed the jury that:

". . . It will be proper for you in determining the penalty to be assessed to fix the same by lot, chance, or any other method than by a full, fair, and free exercise of the opinion of the individual jurors, under the evidence admitted before you. . ." (Page 3, lines 1-5, of the **Argument to the Jury**).

The record, of course, does not reveal just how the jurors arrived at a penalty of **10 years** in the Texas State Prison. (petitioners were charged with breaking into a liquor store and stealing a "C.B." radio out of a parked vehicle.)

In the penalty phase of the case, petitioners could have testified but exercised their constitional right to not do so. The prosecutor then commented to the jury:

". . . They probably think they're going to walk on probation, and nothing they've said. . ." (Page 13, lines 19-20, of the **Argument to the Jury**).

Such appears to be in patent violation of the mandate of **Giffin v. California**, 380 U.S. 609.

The prosecutor argued longly and loudly against awarding probation to the petitioners, erroneously telling the jury:

". . . It's (i.e., probation) a **privilege, not a right. . .**"

in violation of **Morrissey v. Brewer,** 408 U.S. 471 (1972), which rejected the concept that due process may be denied in **parole** proceedings on the gound that **parole** was a **privilege rather than a right.**

Defense counsel took no steps to correct either the foregoing **Griffin v. California,** 380 U.S. 609, or **Morrissey v. Brewer,** 408 U.S. 471, errors, nor did the trial judge. The same is a denial of effective assistance of counsel and due process of law within the meanings of the Sixth and Fourteenth Amendments to the U. S. Constitution.

In a like vein, the prosecutor was in possession of information totally exculpating petitioner Mills from the burglary of the vehicle in the form of statements made by one **Larry Fugett** to Chief District Attorney **Tim Eyssen** of Wichita Falls. The prosecutor and his staff wilfully suppressed said statements in violation of **Brady v. Maryland,** 373 U.S. 83, 87, and **United States v. Agurs,** 427 U.S. 97, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (6-24-76).

Said error, being material, cannot be saved by the Federal Harmless Error Rule of **Chapman v. California,** 386 U.S. 18, 24, and **Fahy v. Connecticut,** 375 U.S. 85.

Defense counsel likewise failed to turn up said statement in pre-trial discovery and as a consequence urged **both** petitioners to plead guilty. No defense was planned. This is a denial of the effective assistance of counsel. **In re Branch,** 70 Cal 2d 200, 210.

Jury misbehavior occurred in the case including but not limited to:

(a) jurors admitted discussing that the petitioners did not testify in their own behalf;

(b) jurors discussed the case in the halls with non-jurors;

(c) jurors potentially decided the penalty "by lot or by chance," pursuant to the Court's instruction.

(f)

ARGUMENT

I

THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY THAT THEY COULD DECIDE THE PENALTY BY "LOT, CHANCE, OR ANY OTHER METHOD" OTHER THAN THE UNANIMOUS DECISION OF THE JURY ON THE PENALTY.

At page 3, lines 1-5, of the **Argument To The Jury,** the trial judge, Honorable Stanley C. Kirk, instructed the jury that:

". . . It will be proper for you in determining the penalty to be assessed to fix the same by lot, chance, or any other method than by a full, fair and free exercise of the opinion of the individual jurors, under the evidence admitted before you."

This is clearly error, for **In Re Winship,** 397 U.S. 358, 364, extends the Due Process Clause protection to **each fact** necessary to be proven by the State of Texas against a criminal defendant that it is proceeding against. This means that all twelve (12) jurors must unanimously agree on the specific penalty; it cannot be determined or fixed by "lot, chance, or any other method."

While **Winship** ordinarily alludes to **guilt** determination, it is equally applicable to **penalty** determination, and Due Process is equally applicable to a twelve (12)

man unanimous penalty determination. **In Re Winship.** 397 U.S. 358, 364, 25 L. Ed 2d 368, 375, 90 S. Ct. 1068, provides:

"Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

Thus it is clear that Federal Constitutional error occurred here where jury unanimity was not required by the Court's instruction. Certiorari must be accorded.

II

THE PROSECUTOR HAD IN HIS FILES, OR IN THE MINDS OF HIMSELF OR HIS FELLOW PROSECUTORS, EVIDENCE THAT ONE **LARRY FUGETT** HAD OBSERVED THE SO-CALLED MOTOR VEHICLE BURGLARY, AND HAD PERSONAL KNOWLEDGE THAT APPELLANT **BILLY DON MILLS** HAD NOT PARTICIPATED; **FUGETT** TOLD THE OFFICE OF THE DISTRICT ATTORNEY THAT **MILLS** WAS NOT A PARTICIPANT IN THE BURGLARY OF THE MOTOR VEHICLE ON DECEMBER 18, 1975, AND SAID INFORMATION WAS SUPPRESSED FROM TRIAL DEFENSE COUNSEL IN VIOLATION OF **UNITED STATES v. AGURS,** 427 U.S. 97, 49 L. Ed. 2d 342, 96 S. Ct. 2392, 19 Cr. L. 3195 (6-24)76) AND **BRADY v. MARYLAND,** 373 U.S. 83, 87.

It is too well established to now be questioned that a state prosecutor must turn over to defense counsel "evidence highly probative of innocence" which is within his personal knowledge.

The recent case **United States v. Agurs,** 427 U.S. 97, 96 S. Ct. 2392, 19 Cr. L. 3195, 49 L Ed 2d 342, provides:

"Nor do we believe the constitutional obligation is measured by the moral culpability, or the wilfulness, of the prosecutor. **If evidence highly probative of innocence is in his file, he should be presumed to recognize its significance even if he has actually overlooked it. Giglio v. United States,** 405 U.S. 150, 154, 31 L. Ed. 2d 104, 92 S. Ct. 763. Conversely, if evidence actually has no probative significance at all, no purpose would be served by requiring a new trial simply because an inept prosecutor incorrectly believed he was suppressing a fact that would be vital to the defense. If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor."

At page 12, line 13, of **Continuation of Hearing on Request For A New Trial, Larry Fugett** testified under oath about his statement to **Tim Eyssen,** the District Attorney.

Fugett was never contacted by trial attorney **Sam Moreau** for a pre-trial interview of the facts. (Page 13, lines 1-8).

At this hearing the trial Court threatened **Larry Fugett** with a prosecution for perjury should **Fugett** persist in stating that another affidavit that he had furnished to defense counsel Ray Gene Smith was true, and Fugett under these threats withdrew his contention as to the affidavit given defense counsel (pages 13-28, **Continuation of Hearing on Request for a New Trial**).

Nonetheless, it must be noted that the District Attorney, Timothy Eyssen, or someone in his office, had been given a statement other than the ones reduced to writing which tended to exonerate appellant Billy Don

Mills, and the same was unconstitutionally suppressed from the defense, within the broad Federal Constitutional Due Process Mandates of **Mooney v. Holohan,** 294 U.S. 103; **Pyle v. Kansas,** 317 U.S. 213; **Mesarosh v. United States,** 352 U.S. 1; **Alcorta v. Texas,** 355 U.S. 28; **Napue v. Illinois,** 360 U.S. 264; **Brady v. Maryland, 373 U.S. 83, 87; Miller v. Pate,** 386 U.S. 1; **Giles v. Maryland,** 386 U.S. 66; **Giglio v. United States,** 405 U.S. 150; **DeMarco v. United States,** 415 U.S. 449; **United States v. Linda Agurs,** 427 U.S. 97, 49 L. Ed. 2d 342, 96 S. Ct. 2392, 19 Cr. L. 3195 (6-24)76). See also such persuasive authority as **Imbler v. Craven,** 298 F. Supp. 795 (C.D. Calif. 1969); **In Re Ferguson,** 5 Cal 3d 525; **People v. Ruthford,** 14 Cal 3d 399, 405-409; **People v. Westmoreland,** 58 Cal App 3d 32. See also **U.S. v. Keogh,** 391 F. 2d 138 (2d Cir. 1968).

Indeed, **Giglio, supra,** holds the entire office of a given prosecutoral office responsible for the knowledge imparted to one member of that office. As **Giglio v. United States,** 405 U.S. 150, 154, 31 L. Ed 2d 104, 109, 92 S. Ct. 763, provides:

"In the circumstances shown by this record, neither Di Paola's authority nor his failure to inform his superiors or his associates is controlling. Moreover, whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government. See Restatement (Second) of Agency #272. See also American Bar Association Project on Standards for Criminal Justice, Discovery and Procedure Before Trial #2.1(d). To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communi-

cation of all relevant information on each case to every lawyer who deals with it."

Thus, it is clear that the instant conviction must and should be reversed and remanded to the District Court of Wichita County, Texas.

It is therefore irrelevant to the issue of whether a new trial should be accorded to attempt to discern whether the head District Attorney, Timothy Eyssen, or another member of his staff, was given the information by Larry Fugett. Under any such shown possession of information on the part of the prosecutor's office of Wichita County, the case must be reversed.

III

THE PROSECUTOR COMMITTED PREJUDICIAL ERROR OF FEDERAL CONSTITUTIONAL MAGNITUDE WITHIN THE MEANING OF **MORRISSEY v. BREWER,** 408 U.S. 471 (1972), IN TELLING THE JURY THAT "PROBATION WAS A PRIVILEGE, NOT A RIGHT", AND IT WAS A DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL FOR TRIAL DEFENSE COUNSEL TO HAVE FAILED TO OBJECT OR EXCEPT TO THIS IMPROPER ARGUMENT.

At page 15, line 16, **Argument to the Jury,** the prosecutor quoted erroneous law to the twelve (12) man lay jury which the Trial Judge took no steps to correct:

". . . It's (i.e., probation) a **privilege, not a right. . .**"

Under Texas law, of course, probation is a **right, not a privilege.**

It must be remembered that the case of **Morrissey v. Brewer,** 408 U.S. 471 (1972), rejected the concept that due process may be denied in **parole** proceedings on the ground that **parole** was a privilege rather than a right.

Similarly, it can be well stated that probation is a **right,** not a privilege, under Texas law, and it is error for a prosecutor to mislead a jury; it is error for a trial judge to not correct this error; and it is a denial of effective counsel for trial defense counsel to have failed to object or except to this prosecutoral misconduct. See page 346, Sec. 20.02.1, **"Supplement to the Criminal Defense Sourcebook, a Texas Lawyer's Guide,"** by Ray Edward Moses.

Because of this clear erroneous impacting of erroneous law on the jury with failure of the trial court to alter it, certiorari must and should be granted.

This error goes to the duality of ineffective counsel and Fourteenth (14th) Amendment denial of Due Process of Law.

This Honorable Court should grant certiorari with Oral Argument.

IV

THE PROSECUTOR VIOLATED APPELLANTS' RIGHTS UNDER **GRIFFIN v. CALIFORNIA,** 380 U.S. 609, 14 L. Ed. 2d 106, 85 S. Ct. 1229, IN COMMENTING TO THE JURY THAT APPELLANTS DID NOT SPEAK IN THEIR OWN DEFENSE; LIKEWISE, TRIAL DEFENSE COUNSEL PROVIDED INEFFECTIVE DEFENSE UNDER THE SIXTH (6th) AND FOURTEENTH (14th) amendment in failing to object or except to this serious deprivation of due process of law.

At the trial of the penalty before the jury, the prosecutor commented to the jury that the appellants had not taken the witness stand in their own defense. At page 13, lines 19-20, of **Argument to the Jury,** the prosecutor said:

". . . They probably think they're going to walk on probation, and nothing they've said. . ."

Griffin v. California, 380 U.S. 609, 14 L. Ed. 2d 106, 85 S. Ct. 1229, provides at 615 of 380 U.S. 609, and at 110 of 14 L. Ed. 2d 106:

"We said in Malloy v. Hogan, supra, 378 U.S. p. 11, 12 L. Ed 2d p. 661, that 'the same standards must determine whether an accused's silence in either a federal or state proceeding is justified.' We take that in its literal sense and hold that the Fifth Amendment, in its direct application to the Federal Government, and in its bearing on the states by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."

Because of this deprivation of rights under **Griffin v. California,** this conviction must be reversed.

V

THE TRIAL JUDGE ERRONEOUSLY CHARGED THE JURY THAT HE, THE TRIAL JUDGE, HAD **DISCRETIONARY** POWER TO MAKE, AS A CONDITION OF PROBATION, THAT THE DEFENDANTS COMMIT NO CRIMES (page 4, line 10-14, **Argument to the Jury**). IN FACT, THE COURT IS REQUIRED TO MAKE AS A CONDITION OF PROBATION THAT THE DEFENDANTS COMMIT NO OFFENSES AGAINST THE STATE OF TEXAS, ANY OTHER STATE, OR THE UNITED STATES.

At page 4, lines 10-14, **Argument to the Jury,** the Court stated to the jury that:

". . . The conditions of probation which this court **may** impose shall be limited to but not necessarily include all of the following:

(1) that he commit no offense against the laws of this State or of any other State or of the United States; . . ."

The impression that this erroneous instruction left with the jury was that it allowed the jury to believe that if the court ultimately chose **not** to include condition of Probation Number One (1) in the conditions impressed on the defendants, then the defendants could commit other crimes and not face revocation of their probation no matter how serious might be a crime that they subsequently committed.

The prosecutor aided, hand-in-glove, this error by his argument directed toward the "crime control" pitch that he made to the jury, e.g.:

". . . But you've got to be strong as a juror. . ." (page 10, line 19, **Argument to the Jury**).

". . . And there is no law enforcement or no law protection until twelve (12) jurors have the guts to send some of these people away. . ." (page 10, lines 24-26, **Argument to the Jury**).

". . . and my police officers and your police officers can be out there risking their lives making these cases. . (page 10, lines 27-28, **Argument to the Jury**).

". . . Probation is nothing more than being a good citizen. There are some people that are deserving of probation. There are some that are not. . ." (page 13, lines 8-10, **Argument to the Jury**).

". . . And then just slap them on the wrist; **that's not going to be any deterrent to anybody outside this building.** They don't deserve any sympathy. They're grown and they're responsible for their acts. . ." (page 14, lines 16-19, **Argument to the Jury**).

". . . You're going to have to gully it up and have some guts and deter others from committing the same or similar offenses by putting them in the Texas Department

of Corrections long enough so other people on the outside won't want to do the same things . . . . because the jury might convict them and put them in the penitentiary for a long time. . ." (page 15, lines 6-12, **Argument to the Jury**).

". . . And it's not going to be that way until juries like you are strong enough to put the biggies away where they cannot commit other crimes. . ." (page 16, lines 23-25, **Argument to the Jury**).

And we have just set forth a sample of the permeating "law and order" diatribe of the prosecutor. For a jury to be erroneously told that the Court **might not** include, as a condition of probation, that the defendants not commit any new crimes, when all know that the commission of new crimes constitutes a violation of probation **per se**, when coupled with the prosecutor's argument set forth above, readily makes it apparent that great prejudice occurred.

Petition for certiorari should be granted and oral argument accorded.

CONCLUSIONS

For the resolution of the apparently unique issue of whether due process of law is accorded by a State of Texas judge ordering that a criminal sanction may be decided "by lot or by chance," and for other reasons set forth in this Petition, the Petition for Writ of Certiorari to the Court of Criminal Appeals of the State of Texas should be granted.

DATED this 25th day of July, 1977, at Santa Ana, California, and Wichita Falls and Dallas, Texas

Respectfully submitted.

ROGER S. HANSON, ESQ.
RAY GENE SMITH, ESQ.
SCOTT HUDSON, ESQ.
by ROGER S. HANSON,
Member of the Bar,
United States Supreme
Court

Attorneys for Petitioners

EXHIBIT A

SIMMIE LYNN McCALL and
BILLY DON MILLS, Appellants

NOS. 54,266 and 54,267, v. Appeals from Wichita County

THE STATE OF TEXAS, Appellee

OPINION

These are appeals from convictions for the offense of burglary of a building in Cause No. 16792-C and burglary of a motor vehicle in Cause No. 16874-C. Pursuant to appellants' written request the two causes were tried together before a jury upon a plea of guilty. Punishment was assessed in each case at ten years.

Initially appellants contend that they failed to receive a fair trial because of ineffective assistance of their retained counsel in the trial court.

The constitutional right to counsel, whether counsel be appointed or retained, does not mean errorless counsel whose competency or adequacy of his representation is not to be judged ineffective by hindsight. Ex parte Prior, 540 S.W.2d 723 (Tex.Cr.App. 1976); see also, Duran v. State, 305 S.W.2d 863 (Tex.Cr.App. 1974).

The adequacy of an attorney's services must be gauged by the totality of the representation. Ex parte Prior, supra; Williams v. State, 513 S.W.2d 54 (Tex.Cr.App. 1974); Coble v. State, 501 S.W.2d 344 (Tex.Cr.App. 1973). The allegations of ineffective representation will be sustained only if they are firmly founded. Faz v. State, 510 S.W.2d 922 (Tex.Cr.App. 1974). Effectiveness of retained counsel must be gauged

by whether or not there is a breach of legal duty. Ex parte Raley, 528 S.W.2d 257 (Tex.Cr.App. 1975), and cases cited therein.

As this Court wrote in Chapman v. State, 478 S.W.2d 91 (Tex.Cr.App. 1972(;

". . . complaints of ineffective counsel must be examined in light of what the Court said in Williams v. Beto, 354 F.2d 698 (5th Cir): 'as no two men can be exactly alike in the practice of the profession, it is basically unreasonable to judge an attorney by what another would have done, or says he would have done, in the better light of hindsight.' "

An attorney must appraise a case and do the best he can with the facts and the fact that other counsel might have tried the case differently does not show inadequate representation. Ex parte Prior, supra. See Rockwood v. State, 524 S.W.2d 292 (Tex.Cr.App. 1975), and Witt v. State, 475 S.W.2d 259 (Tex.Cr.App. 1971). See also, United States v. Rodriguez, 498 F.2d 302 (5th Cir. 1974).

We have carefully examined the record and appellants' numerous allegations and cannot conclude there was ineffective assistance of counsel. This record does not support or reflect any wilful misconduct by an employed counsel without appellants' knowledge which amounts to a breach of the legal duty of an attorney. Trotter v. State, 471 S.W.2d 822 (Tex.Cr.App. 1971). Even if we used the "reasonably effective assistance" standard of Ex parte Gallegos, 511 S.W.2d 510 (Tex.Cr.App. 1974), we would reach the same result.

Nothing appears in the record to show any bad faith, insincerity or disloyalty toward appellants by their attorney. A good faith error or mistake, if any, made by retained counsel with honest and earnest purpose to

serve his client cannot be the basis of a claim of reversible error. Mills v. State, 483 S.W.2d 264 (Tex.Cr.App. 1972): see also, Popeko v. United States, 294 F.2d 168 (5th Cir. 1961).

We find that appellants had adequate representation in the trial court. Nor do we conclude that appellants have been deprived of a fair trial or due process of law.

Next, appellants contend that the trial court erred in failing to grant their motion for new trial because of alleged jury misconduct.

Appellants do not cite any authority or present any argument but merely set out part of the testimony of one of eight jurors who testified at the hearing on their motion for new trial. While this ground of error is not in compliance with Article 40.09, Section 9, V.A.C.C.P., we have reviewed the voluminous testimony heard at the hearing and hold that this contention is without merit. The decision of the trial court on passing upon a motion for new trial will not be disturbed by this Court in the absence of an abuse of discretion. Powell v. State, 502 S.W.2d 705 (Tex.Cr.App. 1973). The testimony solicited appears to be an attempt by appellants to develop the mental processes of the jury in arriving at the punishment assessed. This is not allowed. Peak v. State, 522 S.W.2d 907 (Tex.Cr.App. 1975). In fact, most of the testimony is contradictory to appellants' allegations and even conflicting in the juror's testimony set out in their brief as well as the others. Where the evidence is conflicting as to alleged jury misconduct, the ruling of the trial court on the motion for new trial is ordinarily conclusive on appeal. Williams v. State, 481 S.W.2d 119 (Tex.Cr.App. 1972).

Appellants' third ground of error complains of the admission into evidence during the punishment stage of the trial.

No authority is cited nor is any argument made in support of this ground of error. Since this ground of error is not in compliance with Article 40.09, Section 9, supra, nothing is presented for review. Williams v. State, 504 S.W.2d 477 (Tex.Cr.App. 1974).

Their next complaint is directed toward the trial court's failure to give an instruction to the jury on mitigation of punishment by reason of intoxication in accordance with V.T.C.A., Penal Code, Section 8.04, subsections A, B, C, D and E.

We find no evidence raising the issue of temporary insanity by reason of intoxication. The mere fact that there is testimony that appellants were or may have been intoxicated is insufficient. For an instruction pursuant to Section 8.04, supra, it must be shown that an appellant as a result of intoxication (1) "not know his conduct is wrong", or (2) "was incapable of conforming his conduct to the requirements of the law he violated." Hart v. State, 537 S.W.2d 21 (Tex.Cr.App. 1976). His contention is overruled.

Lastly they complain of improper jury argument by the prosecutor. The record reflects that no objection was made to the complained of comments. Absent an objection, nothing is presented for review.

No reversible error having been shown, the judgments are affirmed.

Per Curiam

(Delivered May 18, 1977)

COURT OF CRIMINAL APPEALS OF TEXAS
CLERK'S OFFICE
Austin, Texas, June 8, 1977

Dear Sir:

I have been instructed to advise that the Court has this day denied "Leave To File" the Appellants' Motion for Rehearing in Cause No. 54,266, 54,267, SIMMIE LYNN MCCALL & BILLY DON MILLS vs. THE STATE OF TEXAS Appellee.

Request to hold mandate is denied

Sincerely yours,
THOMAS LOWE, Clerk

EXHIBIT B

PROOF OF SERVICE

STATE OF CALIFORNIA)
ss
County of Riverside)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 1509 N. Main, Santa Ana, California.

On August 16, 1977, I served the within PETITION FOR WRIT OF CERTIORARI on the interested parties in said action, by placing three copies in each of two sealed envelopes, with postage thereon fully prepaid, in the United States mail at Santa Ana, California, addressed as follows:

Hon. John L. Hill, Jr.
Attorney General, State of Texas
P. O. Box 12548
Austin, Texas 78711

Court of Criminal Appeals of Texas
Supreme Court Building
Capitol Station
Austin, Texas 78711

I CERTIFY under penalty of perjury that the foregoing is true and correct.

EXECUTED ON August 16, 1977 at Santa Ana, California.

.....
JACK GALLAGHER

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

* * *

NO. 77-269

* * *

SIMMIE LYNN McCALL and BILLY DON MILLS,

Petitioners

V.

THE STATE OF TEXAS,

Respondent

* * *

BRIEF FOR RESPONDENT IN OPPOSITION

* * *

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
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CASES **PAGE**

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

* * *

NO. 77-269

* * *

SIMMIE LYNN McCALL and
BILLY DON MILLS,
Petitioners

V.

THE STATE OF TEXAS,
Respondent

* * *

BRIEF FOR RESPONDENT IN OPPOSITION

* * *

OPINION BELOW

The Texas Court of Criminal Appeals affirmed Petitioners' conviction in a per curiam opinion rendered May 18, 1977, a copy of which is attached to this Brief in Opposition as Appendix "A".

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

The questions presented for review before this Court, including those issues raised in Petitioners' Arguments and Authorities but not set out in his original list of

issues presented, should be stated as follows:

(1) Did the trial court correctly instruct the jury in the proper method by which a determination of the punishment to be assessed could be made?

(2) Did the prosecutor impermissibly withold exculpatory statements from defense councel?

(3) Did the Court below correctly hold that petitioners were not denied the effective assistance of retained counsel in their 1976 conviction?

(4) Did the jury engage in impermissible conduct in assessing petitioners' punishment in their 1976 conviction?

(5) Did the trial court err in failing to instruct the jury on intoxication as a defensive theory in mitigation of punishment?

(6) Did the prosecutor commit reversible error when he argued to the jury that probation was privilege rather than a right?

(7) Did the prosecutor impermissibly refer to the defendant's failure to testify in his closing arguments?

(8) Did the trial court incorrectly advise the jury that it had discretion to make as a condition of probation that the defendant commit no crimes against the laws of Texas or the United States?

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners rely on the Sixth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioners Simmie Lynn McCall and Bill Don Mills were convicted of burglary of a building and burglary of a motor vehicle upon a plea of guilty before a jury on February 11, 1976 in the 89th Judicial District Court of Wichita County, Texas. The Texas Court of Criminal Appeals affirmed the conviction in a per curiam opinion delivered May 18, 1977. Petitioners then filed this Petition for Writ of Certiorari.

ARGUMENTS AND AUTHORITIES

I

THE TRIAL COURT'S ERROR IN INSTRUCTING THE JURY THAT THEY COULD DETERMINE THE PUNISHMENT TO BE ASSESSED BY "LOT, CHANCE, OR ANY OTHER METHOD" OTHER THAN THE UNANIMOUS DECISION OF THE JURY WAS HARMLESS ERROR.

(a) Petitioners contend that Federal Constitutional error occurred when the trial judge orally instructed the jury that:

> "...It will be proper for you in determining the punishment to be assessed to fix the same by lot, chance, or any other method than by a full, fair and free exercise of the opinion of the individual jurors, under the evidence admitted before you."
>
> (Record on Appeal: Arguments to the Jury, p. 3, lines 1-5)

It is Petitioners' contention that such an instruction failed to require Jury unanimity and thus violated the

mandate of *In Re Winship*, 397 U.S. 358 (1970).

However, Petitioners overlook the fact that the trial judge correctly instructed the jury that their verdict had to be unanimous. (Record on Appeal: Arguments to the Jury, p.5, Lines 13-15). Additionally, written copies of the trial Judge's instructions were taken into the jury room. These instructions correctly charged:

> "...it will not be proper for you in determining the punishment to be assessed to fix the same by lot, chance or any other matter than by full, fair, and free exercise of the opinion of the individual jurors..."
>
> (Record on Appeal: Transcript, p. 25).

During the hearing on Petitioners' Motion for New Trial, a juror testified that during their deliverations, the jurors took "every one of the charges down the line." (Record on Appeal: Volume 2, p. 124, line 27).

Petitioners have failed to demonstrate how they were harmed by what appears to be either the trial judge's apparent slip of the tongue or an error in transcription. There were no statements from any of the jurors called to testify on Petitioners' Motion for New Trial that the punishment they assessed was determined by lot or chance or any other method than by their unanimous decision.

Petitioners have completely failed to establish that the technical error complained of in any way affected the fundamental fairness of their plea of guilty before the jury. Petitioners have failed to show prejudice. *See Generally, Finley v. United States* 271 F.2d 777 (5th Cir.), *cert. denied* 361 U.S. 870 (1959).

(b) Petitioners claim fundamental error in the trial

judge's instruction to the jury regarding their use of lot or chance. Petitioners did not raise this ground on direct appeal from conviction. *See*, Appendix "A". The failure to do so constitutes an inexcusable procedural default barring relief herein. *Wainwright v. Sykes*, ____U.S.____ (1977), 97 S.Ct. 2497; *Loud v. Estelle*, No. 76-3042, _____F.2d_____ (5th Cir., August 5, 1977).

II.

THE PROSECUTOR DID NOT WITHHOLD EXCULPATORY STATEMENTS FROM DEFENSE COUNSEL.

Petitioners contend the prosecutor suppressed an exculpatory statement by Larry Fugett in violation of *United States v. Agurs*, 427 U.S. 97 (1976). The record before this Court does not support that contention.[1]

At the hearing on Petitioners' Motion for New Trial, trial counsel testified that he was unaware of the complained of second statement by Fugett. (Record on Appeal, Vol. II, p. 86, line 24). He further testified that the district attorney allowed him to persue his entire file without the necessity of filing a pretrial motion. It was trial counsel's opinion that the statement by Fuget contained in the file was not exculpatory when read in its entirety.

The district attorney also testified in petitioners' Motion for New Trial hearing. He stated that he had turned his entire file over to the Petitioners' defense

[1]There are apparently two statements at issue here. The first statement is typewritten, dated December 18, 1975, and was made while Fugett was under arrest. That statement implicates Billy Don Mills as a lookout and Simmie Lynn McCall as the person actually in the automobile. The second statement is handwritten by Fuget and dated February 20, 1976. The second statement witnessed by an investigator employed by defense counsel on motion for new hearing, recites that Fuget informed the District Attorney that Mills had "nothing to do with what happened".

counsel before trial and that he had never seen the handwritten statement in question, nor was he familiar with its contents until the motions had been filed.

After a lengthy cross-examination and admonishments by the trial court, Larry Fuget testified at the Motion for New Trial hearing that the statement given by him on December 18, 1975 was the corect statement and that the second statement, given to an investigator for appellants' counsel, was untrue.

Thus here is a situation where both the district attorney and trial counsel state that the district attorney's files were made available to the defense. The district attorney denies being aware of the nature of the second statement. These facts certainly do not amount to a withholding by the district attorney of exculpatory evidence as condemned by *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny.

III.
THE COURT BELOW CORRECTLY HELD THAT PETITIONERS' RETAINED COUNSEL WAS EFFECTIVE

Petitioners would have this court reverse their convictions for their trial attorney's alleged failure to protect certain well recognized constitutional rights. As examples of this failure, Petitioners cite to defense counsel's failure to object to jury argument by the state's attorney which petitioners claim violated the standards of *Griffin v. California*, 380 U.S. 609 (1965). Petitioners also assign error to defense counsels failure to call key witnesses to establish diminished capacity to form the specific intent necessary to commit burglary.

This case involved a guilty plea by both petitioners with a jury chosen to assess punishment. The Texas Court of Criminal Appeals correctly stated in its affirmance that:

> "We have carefully examined the record and Appellants numerous allegations and cannot conclude that there was ineffective assistance of counsel. This record does not support or reflect any willful misconduct by an employed counsel without Appellants' knowledge which amounts to a breach of a legal duty of an attorney...even if we used the "reasonably effective assistance" standard...we would reach the same results." (Appendix "A")

As noted by the court below, the fact that other counsel might have tried the case differently does not show inadequate representation. *United States v. Rodriquez*, 498 F.2d 302 (5th Cir. 1974).

Respondent contends Petitioners' retained counsel rendered reasonably effective assistance as required by *Fitzgerald v. Estelle*, 505 F.2d 1334 (5th Cir.), *cert denied* 422 U.S. 1011 (1975). Failure to make a particular objection may have been a result of trial strategy as well as any other reasonable explanation. Certainly it does not suffice to illustrate incompetence or ineffective assistance. Similarly, trial counsel's failure to call expert witnesses on intoxication, in light of much trial testimony that although the defendants had been drinking they appeared coherent and mobile, fails to rise to the level of ineffective assistance. Trial counsel's decision not to call expert witnesses could have been a tactical move based on the expected benefit to be gained from such testimony balanced against its cost to the two young petitioners.

Reasonably effective assistance is an easier standard to meet in the context of a guilty plea than in a trial. *Herring v. Estelle* 491 F.2d 125, 128 (5th Cir. 1974). Here Petitioners have made no claim that trial counsel failed to ascertain if their plea was entered voluntarily and knowingly. Neither do they claim that trial counsel

failed to actually and substantially assist them in deciding whether to plead guilty. *Herring, supra.* Petitioners' disagreement with their retained counsel on a guilty plea because of differences of opinions on trial tactics, falls far short of a lack of fundamental fairness or a failure to render reasonably effective assistance.

IV.

THE COURT BELOW USED THE CORRECT STANDARD IN REVIEWING THE EFFECTIVENESS OF PETITIONERS' COUNSEL.

Petitioners assert that the Texas Court of Criminal Appeals used the wrong standard in reviewing the effectiveness of their retained trial counsel. Petitioners are troubled by language in the state court's opinion dealing with "willful misconduct" and "bad faith, insincerity, or disloyalty toward Appellants by their attorney." *See* Appendix "A".

Respondent answers that the Texas Court of Criminal Appeals found trial counsel's representation of Petitioners to be adequate under two standards. The Court below looked at the record under both a breach of legal duty and a reasonably effective assistance standard. In *Fitzgerald v. Estelle, supra,* the United States Court of Appeals for the Fifth Circuit noted in a footnote at 1337:

> "Putting to one side the fact that the District Judge had the right to and did determine in denying the Motion for New Trial, that the Defendants had not shown that they had had any material witnesses who would have been assistance to them and whose names they gave to their trial counsel and that they had refused to call them, we think it basic to the claim of

> relief, since Defendants were represented by their own employed trial counsel, they may not assign as error that the mistakes or errors of their counsel constituted unfair trial, and that, *without a showing of a deliberate purpose on the part of counsel to prevent Defendants from obtaining a fair trial,* or actions so grossly negligent as to amount to substantially the same thing, Defendants cannot relieve themselves of the errors, mistakes or misjudgments of their counsel by having the trial set aside." (Emphasis added).

Based on the underscored language cited above, the Texas Court of Criminal Appeals correctly reviewed the record on appeal to determine if there were any instances of willful misconduct by Petitioners' attorney. The Court below then examined the record to determine if it would support a finding of reasonably effective assistance in light of Petitioners' numerous allegations of ineffective representation. Under either test, the Texas Court of Criminal Appeals correctly held that Petitioners had adequate representation in the trial court and were not deprived of either a fair trial or due process of law.

V.

THE COURT BELOW CORRECTLY HELD THAT THERE WAS NO MERIT IN PETITIONERS' CLAIM OF JURY MISCONDUCT.

Petitioners give examples of three alleged acts of misconduct by the jurors in their case which they claim warrants reversal of their conviction: (1) discussing that the defendants did not testify in their own behalf; (2)

talking to persons in the halls contrary to the court's instruction; (3) determining or potentially determining the penalties assessed by lot or chance.

Respondent notes that there was no testimony at the Motion for New Trial hearing from any of the jurors that petitioners' punishments were assessed by lot or chance. Furthermore, although there was some conflicting testimony as to whether or not the fact that the defendants did not testify in their own behalf was mentioned in the jury room, no juror testified that this was ever discussed by the group as a whole or that the defendants' failure to testify had any substantial impact on their decision.

The Texas Court of Criminal Appeals noted in its affirming per curiam opinion on direct appeal from conviction that most of the testimony of alleged jury misconduct developed at petitioners' hearing on their Motion for New Trial was either contradictory to their allegations or conflicting. The lower court also noted that under Texas law when the evidence is conflicting as to alleged jury misconduct, the ruling of the trial court on the Motion for New Trial is ordinarilly conclusive for appeal purposes. *See Williams v. State* 481 S.W.2d 119 (Tex. Crim. Ap. 1972).

Petitioners' have failed to present this court with an alleged error which raises a federal question. An allegation of jury misconduct does not rise to constitutional dimensions. *Hinajas v. Black*, 462 F.2d 621 (9th Cir.), *cert denied* 409 U.S. 1126 (1973).

VI.

THE COURT BELOW CORRECTLY HELD THAT THE TRIAL COURT DID NOT ERR IN FAILING TO INSTRUCT THE JURY ON

A DEFENSIVE THEORY OF INTOXICATION.N.

Petitioners contend that the trial court should have given an instruction to the jury of a defensive theory of intoxication as mitigation of punishment under V.T.C.A., Penal Code, Section 8.04 A, B, C and D. (See Appendix "B"). This contention was rejected by the Texas Court of Criminal Appeals which found that there was no evidence raising the issue of temporary insanity by reason of intoxication.

Respondent asserts that the Court below properly applied the applicable Texas law when it held that in order for an instruction to be given pursuant to Section 8.04 *supra*, it must be shown that as a result of intoxication a Defendant (1) "does not know his conduct is wrong," or (2) "was incapable of confirming his conduct to the requirements of the law he violated." Under Texas law, testimony in the record that a Defendant was or may have been intoxicated is insufficient to raise the issue of temporary insanity. *See* Appendix "A".

Moreover, allegations of improper jury instruction raise no question of constitutional significance unless the error resulted in a miscarriage of justice, as, for example, in impermissibly shifting the burden of proof. *United States ex rel. Standridge v. Zelker*, 514 F.2d 45, 50 (2nd Cir. 1975), *cert. denied* 423 U.S. 872 (1975), citing *Cupp v. Naughten*, 414 U.S. 141 (1973); *DeBerry v. Wolf*, 513 F.2d 1336 (8th Cir. 1975), *Bryan v. Wainwright*, 511 F.2d 644 (5th Cir.), *cert. denied*, 423 U.S. 837 (1975); *Young v. Alabama*, 443 F.2d 854 (5th Cir.), *cert denied*, 405 U.S. 976 (1972); and *Murphy v. Beto*, 416 F.2d 98 (5th Cir. 1969). The failure to charge the jury on the ground presented in this petition is a matter of state law and raises no federal

constitutional question.

VII.

THE PROSECUTOR COMMITTED NO ERROR IN ARGUING TO THE JURY THAT "PROBATION WAS A PRIVILEGE, AND NOT A RIGHT".

Petitioners complained that during this final argument, the prosecutor told the jury:

> "You don't have to give probation. They asked for it. It's a right they have under the statutes. But because they asked for it, don't be mislead and believe you have to give it to them. It is a privilege; not a right."

Petitioners incorrectly argue that *Morrissey v. Brewer*, 408 U.S. 47 (1972) held that due process must be afforded in parole proceedings on the grounds that parole was a privilege rather than a right. Analogzing to *Morrissey v. Brewer*, Petitioners then incorrectly assert that probation is a right, not a privilege under Texas law. However, Petitioners have misinterpreted the holdings of *Morrisesey v. Brewer*. *Morrissey v. Brewer* did not hold that parole (or by analogy, probation) was a matter of right and not a privilege. Rather, *Morrissey v. Brewer* explained that it is no longer useful to consider questions of possible due process deprivations in terms of whether something is a "right" or "privilege".

However, even a correct interpretation of *Morrissey v. Brewer* is irrelevant to Petitioner's complaint.

Furthermore, in the context of the prosecutors argument, his statement was correct. According to Texas statutory law, the recommendation of probation

by a jury, or the granting of a probation of sentence by the trial judge, is a matter of discretion. Article 42.12, Sections 3, 3a, 3b, 3c V.A.C.C.P. Similarly, Texas case law also holds that probation is not granted as a matter of right. *See, Scamardo v. State*, 517 S.W.2d 293 (Tex. Crim. Ap. 1974).

Petitioners assign error to the prosecutor's argument that "probation was a privilege, not a right." However, Petitioner did not raise this ground on direct appeal from conviction. *See*, Appendix "A". Their failure to do so constitutes an inexecusable procedural default barring relief in the instat Petition for Writ of Certiorrair. *Wainwright v. Sykes, supra; Loud v. Estelle, supra.*

VIII.

THE PROSECUTOR'S STATEMENT CONCERNING PETITIONERS' FAILING TO TESTIFY SHOULD NOT CONSTITUTE REVERSIBLE ERROR.

During his final argument to the jury, the state's attorney said:

> "They're not little kids as Mr. Moreau has referred to them, and I hope you have been observing their appearances while they have been tried for very serious cases. They could go to the Texas Department of Corrections. Have they appeared to be too worried to you as they sat here at the table and listened to all of this? They probably think they are going to walk on probation, and nothing they've said."
>
> "You might have wondered why I introduced..."

Respondent agrees that it is error for a prosecutor to comment on a defendant's failure to testify. However, Respondent disagrees with petitioners' contention that the argument before this court warrants reversal of their conviction for two reasons.

First, the prosecutor's argument is ambiguous and unclear at best. The record does not reflect any objection or interruption that would explain the district attorney's failure to complete the complained of sentence. On the face of the record, the thrust and meaning of the prosecutor's argument is uncertain.

It is Respondent's position that error, if any, in the prosecutor's statement was clearly harmless error. The harmless error rule may be applied even in a case such as the one before us where the error is possibly one of constitutional dimension. *Vaccaro v. United States* 461 F.2d 626 (5th Cir. 1972). The instant case involves a guilty plea; the sole function the jury was to perform was an assessment of punishment. In determining whether a complained of jury argument violated federal due process of law, the argument must be "so prejudicial that the appellant's state court trial was rendered fundamentally unfair within the meaning of the due procees clause of the Fourteenth Amendment." *Alvarez v. Estelle*, 531 F.2d 1319, 1323 (5th Cir. 1976). *See Bergenthal v. Cady*, 466 F.2d 635 (7th Cir.), *cert denied*, 409 U.S. 1109 (1973). Certainly under any interpretation of the argument it is impossible to conclude that the complained of argument, made in the context of a punishment hearing, caused Petitioners to suffer harm of that magnitude.

Additionally, defense counsel's failure to object to the prosecutor's statement as a matter of trial tactic, was sufficient to waive the error. *Poole v. Fitzharris*, 396 F.2d 544 (9th Cir. 1968).

IX.

THE TRIAL JUDGE CORRECTLY CHARGED THE JURY ON THE CONDITIONS OF PROBATION WHICH MAY HAVE BEEN IMPOSED.

Petitioners complain that the trial court charged the jury:

> "The conditions of probation which this court may impose should be limited to but shall not necessarily include all the following:
>
> (1) that he commit no offense against the laws of this state or of any other state or of the United States. (Record on Appeal: Arguments to the Jury, page 4, lines 10-14.)"

It is Petitioners' unique argument that this charge when coupled with the "law and order" arguments of the prosecutor, would leave the jury the impression that if the trial court chose not to include this condition of probation, then the Defendants could commit other crimes and not face probation revocation despite the seriousness of the crime subsequently committed.

Respondent answers that the trial court's charged directly tracted the six statutory provisions of Article 42.12, Section 6, V.A.C.C.P. (attached hereto as Appendix "C") which may be included as terms and conditions of probation.

Respondent further notes that even had the instruction been error under state law, the giving of a bad instruction presents no federal question. *Michael v. Eyman*, 462 F.2d 626 (9th Cir. 1972).

Petitioners claim fundamental error in the trial judge's instruction to the jury on the terms and conditions or probation which could have been imposed. Petitioners did not raise this ground on their direct appeal from conviction. *See* Appendix "A". Their failure to do so bars them from asserting this claim for the first time on this Petition for Writ of Certiorari. *Wainwright v. Sykes, supra.*

CONCLUSION

For the reasons stated above, Respondent-Appellee avers that there has been no denial of Petitioners' constitutional rights. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

JOE B. DIBRELL
Assistant Attorney General
Chief, Enforcement Division

CATHERINE E. GREENE
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711

Attorneys for Respondent

PROOF OF SERVICE

I, JOE B. DIBRELL, Assistant Attorney General of Texas and a Member of the Bar of this Court, hereby certify that a copy of Respondent's Brief in Opposition has been served by placing same in the United States Mail, postage prepaid, certified, return receipt requested, this ____ day of November, 1977, addressed to Attorneys for Petitioners, Mr. Roger S. Hanson, 518 South Broadway, Santa Ana, California 92701; Mr. Ray Gene Smith, 301 Wichita Falls Savings Building, Wichita Falls, Texas and Mr. Scott W. Hudson, 1318 Mercantile Bank Bldg., Dallas, Texas 75201.

Joe B. Dibrell
Assistant Attorney General

APPENDIX A

SIMMIE LYNN McCALL and
BILLY DON MILLS, Appellants

NOS. 54,266 and 54,267, v.

THE STATE OF TEXAS, Appellee

Appeals from Wichita County

OPINION

These are appeals from convictions for the offense of burglary of a building in Cause No. 16792-C and burglary of a motor vehicle in Cause No. 16874-C. Pursuant to appellants' written request the two causes were tried together before a jury upon a plea of guilty. Punishment was assessed in each case at ten years.

Initially appellants contend that they failed to receive a fair trial because of ineffective assistance of their retained counsel in the trial court.

The constitutional right to counsel, whether counsel be appointed or retained, does not mean errorless counsel whose competency or adequacy of his representation is not to be judged ineffective by hindsight. Ex parte Prior, 540 S.W.2d 723 (Tex.Cr.App. 1976); see also, Duran v. State, 305 S.W.2d 863 (Tex.Cr.App. 1974).

The adequacy of an attorney's services must be gauged by the totality of the representation. Ex parte Prior, supra; Williams v. State, 513 S.W.2d 54 (Tex.Cr.App. 1974); Coble v. State, 501 S.W.2d 344 (Tex.Cr.App. 1973). The allegations of ineffective representation will be sustained only if they are firmly founded. Faz v. State, 510 S.W.2d 922 (Tex.Cr.App. 1974). Effectiveness of retained counsel must be gauged by whether or not there is a breach of legal duty. Ex

parte Raley, 528 S.W.2d 257 (Tex.Cr.App. 1975), and cases cited therein.

As this Court wrote in Chapman v. State, 478 S.W.2d 91 (Tex.Cr.App. 1972):

> "...complaints of ineffective counsel must be examined in light of what the Court said in Williams v. Beto, 354 F.2d 698 (5th Cir): 'as no two men can be exactly alike in the practice of the profession, it is basically unreasonable to judge an attorney by what another would have done, or says he would have done, in the better light of hindsight.' "

An attorney must appraise a case and do the best he can with the facts and the fact that other counsel might have tried the case differently does not show inadequate representation. Ex parte Prior, supra. See Rockwood v. State, 524 S.W.2d 292 (Tex.Cr.App. 1975), and Witt v. State, 475 S.W.2d 259 (Tex.Cr.App. 1971). See also, United States v. Rodriguez, 498 F.2d 302 (5th Cir. 1974).

We have carefully examined the record and appellants' numerous allegations and cannot conclude there was ineffective assistance of counsel. This record does not support or reflect any wilful misconduct by an employed counsel without appellants' knowledge which amounts to a breach of the legal duty of an attorney. Trotter v. State, 471 S.W.2d 822 (Tex.Cr.App. 1971). Even if we used the "reasonably effective assistance" standard of Ex parte Gallegos, 511 S.W.2d 510 (Tex.Cr.App. 1974), we would reach the same result.

Nothing appears in the record to show any bad faith, insincerity or disloyalty toward appellants by their attorney. A good faith error or mistake, if any, made by retained counsel with honest and earnest purpose to

serve his client cannot be the basis of a claim of reversible error. Mills v. State, 483 S.W.2d 264 (Tex.Cr.App. 1972); see also, Popeko v. United States, 294 F.2d 168 (5th Cir. 1961).

We find that appellants had adequate representation in the trial court. Nor do we conclude that appellants have been deprived of a fair trial or due process of law.

Next, appellants contend that the trial court erred in failing to grant their motion for new trial because of alleged jury misconduct.

Appellants do not cite any authority or present any argument but merely set out part of the testimony of one of eight jurors who testified at the hearing on their motion for new trial. While this ground of error is not in compliance with Article 40.09, Section 9, V.A.C.C.P., we have reviewed the voluminous testimony heard at the hearing and hold that this contention is without merit. The decision of the trial court on passing upon a motion for new trial will not be disturbed by this Court in the absence of an abuse of discretion. Powell v. State, 502 S.W.2d 705 (Tex.Cr.App. 1973). The testimony solicited appears to be an attempt by appellants to develop the mental processes of the jury in arriving at the punishment assessed. This is not allowed. Peak v. State, 522 S.W.2d 907 (Tex.Cr.App. 1975). In fact, most of the testimony is contradictory to appellants' allegations and even conflicting in the juror's testimony set out in their brief as well as the others. Where the evidence is conflicting as to alleged jury misconduct, the ruling of the trial court on the motion for new trial is ordinarily conclusive on appeal. Williams v. State, 481 S.W.2d 119 (Tex.Cr.App. 1972).

Appellants' third ground of error complains of the

admission into evidence during the punishment stage of the trial.

No authority is cited nor is any argument made in support of this ground of error. Since this ground of error is not in compliance with Article 40.09, Section 9, supra, nothing is presented for review. Williams v. State, 504 S.W.2d 477 (Tex.Cr.App. 1974).

Their next complaint is directed toward the trial court's failure to give an instruction to the jury on mitigation of punishment by reason of intoxication in accordance with V.T.C.A., Penal Code, Section 8.04, subsections A, B, C, D and E.

We find no evidence raising the issue of temporary insanity by reason of intoxication. The mere fact that there is testimony that appellants were or may have been intoxicated is insufficient. For an instruction pursuant to Section 8.04, supra, it must be shown that an appellant as a result of intoxication (1) "not know his conduct is wrong", or (2) "was incapable of conforming his conduct to the requirements of the law he violated." Hart v. State, 537 S.W.2d 21 (Tex.Cr.App. 1976). His contention is overruled.

Lastly then complain of improper jury argument by the prosecutor. The record reflects that no objection was made to the complained of comments. Absent an objection, nothing is presented for review.

No reversible error having been shown, the judgments are affirmed.

Per Curiam

(Delivered May 18, 1977)

APPENDIX B

V.T.C.A., Penal Code

§ 8.04. Intoxication

(a) Voluntary intoxication does not constitute a defense to the commission of crime.

(b) Evidence of temporary insanity caused by intoxication may be introduced by the actor in mitigation of the penalty attached to the offense for which he is being tried.

(c) When temporary insanity is relied upon as a defense and the evidence tends to show that such insanity was caused by intoxication, the court shall charge the jury in accordance with the provisions of this section.

(d) For pusposes of this section "intoxication" means disturbance of mental or physical capacity resulting from the introduction of any substance in the body.

APPENDIX C

V.A.C.C.P., **Art. 42.12**

Sec. 6. The court having jurisdiction of the case shall determine the terms and conditions of probation and may, at any time, during the period of probation alter or modify the conditions; provided, however, that the clerk of the court shall furnish a copy of such terms and conditions to the probationer, and shall note the date of delivery of such copy on the docket. Terms and conditions of probation may include, but shall not be limited to, the conditions that the probationer shall:

a. Commit no offense against the laws of this State or of any other State or of the United States;

b. Avoid injurious or vicious habits;

c. Avoid persons or places of disreputable or harmful character;

d. Report to the probation officer as directed;

e. Permit the probation officer to visit him at his home or elsewhere;

f. Work faithfully at suitable employment as far as possible;

g. Remain with a specified place;

h. Pay his fine, if one be assessed, and all court costs whether a fine be assessed or not, in one or several sums, and make restitution or reparation in any sum that the court shall determine; and

i. Support his dependents.